Vol 312

FILED
JUN 27 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 187

FRANK G. RATH, INDIVIDUALLY AND AS PRESIDENT OF HOTEL AND RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, COOKS' LOCAL UNION NO. 167, ET AL.,

Petitioners,

vs.

PEARL E. CROSBY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO AND BRIEF IN SUPPORT THEREOF.

JOSEPH A. PADWAY,
MARTIN E. BLUM,
LEONARD J. STERN,
Counsel for Petitioners.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	2
Statement as to jurisdiction	3
The question presented	5
Reasons relied on for the allowance of the writ	5
Prayer for writ	6
Brief in support of petition	7
Opinion of the court below	7
Jurisdiction	7
The Federal question	8
Statement of the case	10
Specification of errors	10
Argument	11
I. Freedom of speech guaranteed by the Constitution	11
II. A legitimate trade dispute exists between the employer and labor unions	13
III. Employer's claims cannot defeat petitioners' right of free speech	16
Summary and conclusion	20

Table of Cases Cited.

American Federation of Labor v. *Swing*, 22 N. E. (2d) 857	5
American Steel Foundries v. *Tri-City Trade Council*, 257 U. S. 186	5, 14
Apex Hosiery Co. v. *William Leader et al.*, — U. S. —, decided May 27, 1940	14
Boiler & Engine Co. v. *Benner*, 14 Ohio Dec. 357	18
Borderland Coal Co. v. *Gasway*, 278 Fed. 56	18
C. I. O. v. *Hague*, 59 Sup. Ct. 985	11, 13
Carlson v. *California*, 84 L. Ed. 668	4, 5, 6, 12
Chicago R. I. P. R. R. v. *Perry*, 259 U. S. 548	9
Cinderella Theatre v. *Sign Writers' Union*, 6 Fed. Supp. 164	19
Cissna v. *Tennessee*, 246 U. S. 289	9
Cumberland Coal Co. v. *Board of Revision*, 284 U. S. 23	4, 9
DeJonge v. *Oregon*, 299 U. S. 353	13

Page

Exchange Bakery Co. v. *Rifkin*, 245 N. Y. 260 15
Fenske Brothers v. *Upholsterers' Union*, 358 Ill. 239, 193 N. E. 112 18
Grannis v. *Ordean*, 234 U. S. 385 9
Great Northern Ry. v. *Washington*, 300 U. S. 154 14
Henrici Co. v. *Alexander*, 198 Ill. App. 568 18
Herndon v. *Lowry*, 301 U. S. 242 13
Hill v. *Smith*, 260 U. S. 592 9
Home Insurance Co. v. *Dick*, 281 U. S. 397 9
Iron Molders Union v. *Allis Chalmers Co.*, 166 Fed. 45 17
Johnson v. *Zerbst*, 304 U. S. 458 19
Kentucky Diamond Coal Co. v. *Mine Workers*, 188 Ky. 477 19
Mallinckrodt v. *State of Mississippi*, 238 U. S. 41 9
Manhattan Life Insurance Co. v. *Cohen*, 243 U. S. 123 ..... 4, 9
Meadowmoor Dairies, Inc., v. *Milk Wagon Drivers' Union*, 371 Ill. 377, 21 N. E. (2d) 308 ..... 3, 5, 8
Near v. *Minnesota*, 283 U. S. 697 4
Norris v. *Alabama*, 294 U. S. 587 13
People v. *Young*, 188 In. App. 208 18
People ex rel. Bryant v. *Zimmerman*, 278 U. S. 63 9
S. A. Clarke Lunch Co. v. *Waiters' Local*, 22 Ohio App. 265 15
Schenk v. *United States*, 249 U. S. 47 13
Schneider v. *State*, 308 U. S. 147 ..... 4, 11, 13
Senn v. *Tile Layers*, 301 U. S. 468 ..... 4, 5, 11, 13
State ex rel. Anderson v. *Brand*, 303 U. S. 95 9
Thornhill v. *Alabama*, 84 L. Ed. 659 ..... 4, 5, 6, 11, 15
Warner v. *Lilly Co.*, 265 U. S. 526 18
Wise Shoe Co. v. *Lowenthal*, 266 N. Y. 264, 194 N. E. 749 18

OTHER AUTHORITIES CITED.

Constitution of the United States, XIVth Amendment 3, 5, 9-12
Frankfurter and Greene, "The Labor Injunction", p. 33 17
41 Harvard Law Review, 754 19
U. S. C. A., Title 28, Sec. 344(b), Judicial Code, Sec. 237(b) 7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 187

FRANK G. RATH, INDIVIDUALLY AND AS PRESIDENT OF HOTEL AND RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, COOKS' LOCAL UNION NO. 167, ET AL.,

Petitioners,

vs.

PEARL E. CROSBY.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable The Justices of The Supreme Court of the United States:

Frank G. Rath, individually and as President of Hotel and Restaurant Employees' International Alliance, Cooks' Local Union No. 167, et al., respectfully petition for a writ of certiorari to review a decision of the Supreme Court of Ohio, 136 Ohio St. 352, rendered March 6, 1940, reversing a decree of the Ohio Court of Appeals and affirming a decree of the Court of Common Pleas of Cuyahoga County.

A.

Summary Statement of Matter Involved.

Frank G. Rath and the other petitioners are members and officers of the Joint Executive Board of the Hotel and Restaurant Employees' International Alliance, affiliated with the American Federation of Labor. This association is composed of members of Waiters' Union, Local No. 106, Waitresses' Union, Local No. 107, and Cooks' Union, Local No. 167 (R. 177). The membership is composed entirely of citizens residing and working in the City of Cleveland, Ohio, and its environs (R. 342, 354-355, 397).

Pearl E. Crosby is the owner and operator of a restaurant in the City of Cleveland, Ohio (R. 280-281).

In August, 1937, two representatives of the petitioners called upon Mrs. Pearl E. Crosby in an effort to discuss with her the employment of members of the petitioners' labor union in her place of business. This she refused to do (R. 397, 398, 399, 400).

On October 4, 1937, the petitioners proceeded to patrol in front of employer's restaurant, carrying banners containing the following language:

> "Crosby's Restaurant unfair to organized labor. Please do not patronize. Cooks' and Waitresses' Union, affiliated with A. F. of L." (R. 6).

On October 11, 1937, a temporary consent decree was entered into, permitting two pickets in front and one in the rear of plaintiff's place of business (R. 7).

On January 27, 1938, the Court of Common Pleas of Cuyahoga County heard the case on its merits and issued an injunction prohibiting picketing (R. 20-21). The case was heard *de novo* by the Ohio Court of Appeals, and the decree was reversed so as to permit peaceful picketing

(R. 421-423). The Supreme Court of Ohio sustained a motion to certify filed by the appellee, Crosby, herein and by a majority opinion sustained the Trial court's decree prohibiting picketing in any manner whatsoever.

Your petitioners resisted the claim of the employer for an injunction on the ground that the decree of the Trial court, sustained by the Court of Last Resort in Ohio, was repugnant to the XIVth Amendment to the Constitution of the United States, in that it deprived petitioners of the right of freedom of speech and assemblage. The court, by entering the decree, deprived petitioners of the protection of the due-process clause of said amendment.

B.

Statement as to Jurisdiction.

Jurisdiction is invoked under Title 28, U. S. C. A. Section 344 (b) (Judicial Code, Section 237 (b) as amended by the Act of February 13, 1925.)

The decree of the Supreme Court of Ohio was rendered March 6, 1940 (R. 445). Application for rehearing, timely filed, was denied March 27, 1940 (R. 446).

In sustaining the decree of the trial court, the Supreme Court of Ohio was divided 5 to 2. The majority premised its conclusion on the ground that no "legitimate trade dispute" existed, because there was no quarrel between plaintiff and plaintiff's employees. Accordingly, with respect to the Federal question of free speech, it adopted the following language from the case of *Meadowmoor Dairies, Inc.* v. *Milk Wagon Drivers' Union*, 371 Ill. 377, 21 N. E. (2d) 308:

> "The right to contract, the right to do business, and the right to labor freely and without restraint, are all

constitutional rights, equally sacred, *and the privilege of free speech cannot be used to the exclusion of other constitutional rights, nor as an excuse for unlawful activities in interference with another's business* * * *'' (Emphasis supplied) (R. 433).

Judge Day dissented from the majority specifically on the Federal question. He said:

> ''Peaceful picketing, by carrying placards, signs, distribution of literature, or by oral speech, is not, in and of itself, unlawful. It is a lawful right emanating from and protected by the constitutional provision governing the exercise of free speech'' (R. 434).

Similarly, Judge Zimmerman, in his dissenting opinion, said:

> ''The opinion has also been advanced that an injunction denying the members of a labor union the right to apprise the public of the true facts in relation to an employer of labor by means of 'peaceful picketing', * * * would constitute an infringement of the constitutional guarantee of free speech. *Senn* v. *Tile Layers' Protective Union, supra,* (301 U. S. 468, 478, 81 L. Ed. 1229, 1236, 57 Supreme Ct. 857) * * *'' (R. 439).

The following cases are believed to sustain jurisdiction:

Thornhill v. *Alabama,* 84 L. Ed. (Adv.) 659;

Carlson v. *California,* 84 L. Ed. (Adv.) 668;

Manhattan Life Insurance Co. v. *Cohen,* 243 U. S. 123, 134;

Cumberland Coal Co. v. *Board of Revision,* 284 U. S. 23, 24;

Schneider v. *New Jersey,* 308 U. S. 147, and cases therein cited in footnote 8;

Near v. *Minnesota,* 283 U. S. 697.

C.

The Question Presented.

Does the decree of the Supreme Court of Ohio, sustaining the decree of the trial court, which forbids all picketing, peaceful or otherwise, abridge the right of freedom of speech and of the press guaranteed by the XIVth Amendment to the United States Constitution?

D.

Reasons Relied On for the Allowance of the Writ.

The grounds relied on by the petitioners for the allowance of the writ are:

1. The decision of the Supreme Court of Ohio is in direct conflict with the decisions of this Court in *Thornhill* v. *Alabama,* 84 L. Ed. (Adv.) 659; *Carlson* v. *California,* 84 L. Ed. (Adv.) 668; *Senn* v. *Tile Layers' Protective Union,* 301 U. S. 468; *American Steel Foundries* v. *Tri-City Trade Council,* 257 U. S. 186.

2. The precise question of whether the guarantee of free speech, under the XIVth Amendment to the Federal Constitution, precludes a State Equity Court from enjoining peaceful picketing by members of a labor union has not heretofore been decided by this Court. The same question has been raised by the decisions of the Illinois Supreme Court in *American Federation of Labor* v. *Swing,* 22 N. E. (2d) 857, and *Milk Wagon Drivers' Union of Chicago, Local 753, et al.* v. *Meadowmoor Dairies, Inc.,* 371 Ill. 377, 21 N. E. (2d) 308. This Court granted certiorari to review those cases on May 20, 1940, and June 3, 1940, respectively.

3. The case involves in its essential features the question of whether a State court may, by the simple device of finding that the facts in a particular case do not amount to a "legitimate trade dispute", circumvent the protection of the XIVth Amendment, as pronounced in *Thornhill* v. *Alabama*, 84 L. Ed. (Adv.) 659, and *Carlson* v. *California*, 84 L. Ed. (Adv.) 668. Obviously, therefore, a decision on this question is of transcendent and vital importance to all labor organizations throughout the country. The decision of the Supreme Court of Ohio precipitates an anomalous situation wherein courts could, in the absence of statutes, impose restrictions on labor unions, which, under the doctrine of the *Thornhill* and *Carlson* cases, they are, in spite of existing statutes, constitutionally forbidden to impose.

Prayer for Writ.

WHEREFORE your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Clerk of the Supreme Court of Ohio, commanding that court to certify and send to this Court for review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled No. 27639, Crosby, Appellant *v.* Rath et al., Appellees, and that the decree of the Supreme Court of Ohio may be reviewed by this Honorable Court and that your petitioner may hav such other and further relief in the premises as to thi- Honorable Court may seem meet and just; and your petitioner will ever pray.

JOSEPH A. PADWAY,
MARTIN E. BLUM,
LEONARD J. STERN,
Counsel for Petitioners.